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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 274

DWYER OIL TRANSPORT CO., INC.,
Libellant-Respondent,
against
Tug *EDNA M. MATTON*, MATTON STEAMBOAT CO., INC.,
Respondent,
and
Tug *CORPORAL*, TUG CORPORAL CORPORATION,
Petitioner

B. NO. 50 CORPORATION,
Libellant-Respondent,
against
Tug *EDNA M. MATTON*, MATTON STEAMBOAT CO., INC.,
Respondent,
and
Tug *CORPORAL*, TUG CORPORAL CORPORATION,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Title 28, U. S. C.,
Section 1254 (1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. .....

DWYER OIL TRANSPORT CO., INC.,
Libellant-Respondent,

against

Tug *Edna M. Matton*, MATTON STEAMBOAT CO., INC.,
Respondent,

and

Tug *Corporal*, TUG CORPORAL CORPORATION,
Petitioner.

B. NO. 80 CORPORATION,
Libellant-Respondent,

against

Tug *Edna M. Matton*, MATTON STEAMBOAT CO., INC.,
Respondent,

and

Tug *Corporal*, TUG CORPORAL CORPORATION,
Petitioner.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Tug Corporal Corporation, claimant of the Tug *Corporal*, prays that a Writ of Certiorari issue to review the final decision and judgment of the United States

Court of Appeals for the Second Circuit filed May 20th, 1958 and as to which a Petition for Reargument was denied on June 16, 1958. The judgment of the Court of Appeals modified the Final Decrees entered in the United States District Court for the Southern District of New York under date of November 19th, 1957, which had dismissed the libels as against the Tug *Corporal* and held the Tug *Edna M. Matton* solely at fault for damages sustained in a collision between the tows of the two tugboats. The judgment of the Court of Appeals holds the Tug *Corporal* jointly at fault and jointly liable with the Tug *Edna M. Matton* under both libels.

The opinion of the Court of Appeals is reported at 255 F. (2d) 380 and is printed in the appendix attached to this petition.

Numerals appearing in parentheses herein unless otherwise indicated refer to pages of the attached appendix.

Jurisdiction.

The Admiralty jurisdiction was invoked in the District Court and the cases were tried in Admiralty.

The judgment of the Court of Appeals modifying the judgment of the United States District Court for the Southern District of New York was entered herein on May 20th, 1958 and the Petition of Tug Corporal Corporation for rehearing was denied by order entered June 16, 1958 without opinion.

The jurisdiction of this Court is invoked under the Constitution of the United States, Article 3, Section 2, Clauses 1 and 2 and also under Title 28, U. S. C. Section 1254(1).

Questions Presented.

1. During trial of a marine collision case does the burden of proof shift from one party to the other with the evidence under the rule of *The Pennsylvania*, 86 U. S. 125 as the Court of Appeals said herein (28), or is the applicable rule that which was embodied in the language of this Court in *Commercial Molasses Corp. vs. New York Tank Barge Corp.*, 314 U. S. 104 at 110 that the burden of proof in a litigation "does not shift with the evidence." Did the Court of Appeals reach the correct conclusion when it said:

> "In that situation the burden was upon the *Corporal* to prove that this statutory violation could not have contributed to the collision in any way.
>
> • • • • • •
>
> We can only conclude that the *Corporal* did not sustain the burden of proof, which under the *Pennsylvania* rule (86 U. S. 125), came into play once her failure to maintain a proper lookout was established." (26, 28)

Or is the applicable rule that employed in the 1st, 4th and 5th Circuits as follows:

> "• • The Supreme Court in *The Pennsylvania*, 86 U. S. 125 did not intend to establish a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision, no matter how speculative, improbable or remote"?
>
> *Seaboard Tug & Barge* vs. *Rederi A/B Disa*, (C. C. A. 1) 213 F. (2d) 772;
>
> *Compania de Maderas de Carbanen* vs. *The Queenstown Heights* (C. C. A. 5) 220 F. (2d) 120 at 122;
>
> *Webb* vs. *Davis*, (C. C. A. 4) 236 F. (2d) 90.

2. Is the refusal of the District Court to make a requested finding that a vessel in collision was guilty of a statutory violation because of an ineffective lookout and that this contributed to the collision, tantamount to a "determination that the statutory violation could not have played any part in the ultimate collision" as the Court of Appeals herein said it was? (26) May such a refusal properly be called "clearly erroneous" so as to support a reversal of the District Court's decree as the Court of Appeals said it did herein (26); or is such a holding in conflict with *Commercial Molasses Corp.* vs. *New York Tank Barge Corp.*, 314 U. S. 104, 110 and *McAllister* vs. *United States*, 348 U. S. 19.

3. Can the privileged vessel (the Court of Appeals called the *Corporal* privileged (27)), be held liable for any part of the resultant damages solely on the ground that she did not avoid collision by her own efforts alone? The *Corporal* reversed two to three minutes before collision and was making sternway at impact, but the burdened *Matton* did not check her headway or reverse engines until five seconds before collision (25).

4. Does not the expressed reluctance of the Court of Appeals to reach the conclusion it did and the express finding of that Court that the faults of the tugboats involved herein were disproportionate (28) compel exoneration of the Tug *Corporal* by application of the Major-Minor Fault Rule of the *Victory-Plymothian*, 168 U. S. 410; *The City of New York*, 147 U. S. 72 and *The Umbria*, 166 U. S. 404, which rule the Court of Appeals so recently applied under almost identical facts in *Tanker Hygrade No. 24* vs. *Tug Dynamic*, 213 F. (2d) 453.

5. Where the faults of two colliding vessels are disproportionate in severity and both are held at fault, must they bear the damages equally or may liability be apportioned between them in the same proportion as their respective faults contributed to the collision? The Court of Appeals said herein;

> "Our conclusion is indeed reluctantly made. The Admiralty rule of equally dividing damages in property damage cases has been consistently criticized * * * and we are obliged to apply the rule in this case despite the disproportionate degrees of fault disclosed." (28)

Statement of Facts.

On August 6th, 1955, shortly before midnight, a collision occurred between two tows proceeding in opposite directions, in the New York State Barge Canal in the vicinity of Brewerton, close by or under a Bridge known as Bridge E-67. At this Bridge there is a relatively sharp bend in the canal. The Tug *Edna M. Matton* pushing the Barge *Dwyer* 104 was westbound and the Tug *Corporal* pushing the Barge *B 80* was eastbound. Both barges were over 200 feet long and over 40 feet wide (25). The waterway, approximately 90 feet wide (25, 26), was so narrow that the Court of Appeals said (25):

> "The trial judge found and it is not disputed that it would have been imprudent for both vessels to have attempted to make a passing in the narrow bending channel beneath the bridge."

But that is the very thing which the Tug *Edna M. Matton* admittedly tried to do. Her answers to the libels plead (Transcript of Record, page 12):

> "It is the custom at this locality for an eastbound flotilla to hold back westerly of the Bridge until the westbound flotilla has safely passed through."

Thus the westbound *Matton* mistakenly believed she could go through the Bridge and force the *Corporal* to hold back. Both the Court of Appeals and the District Court rejected the claim that the *Matton* was privileged and instead held that the *Corporal* was privileged (27), implicitly ruling that the *Matton* was required to hold back.

The *Matton* made no effort to hold back until five seconds before impact when she belatedly reversed engines as the Court of Appeals said (25). The bows of the two barges collided and as the answer of the *Matton* alleges (Transcript of Record, page 12) "simultaneously there was a contact of the starboard bow of the *No. 104* with the starboard bridge abutment." (The *No. 104* was being pushed by the *Matton*.) Obviously the *Matton* was trying to squeeze through the bridge while the *Corporal* still was under it.

Some 1,800 or 2,000 feet to the eastward from Bridge E-67 is Lock 23 from which the *Matton* tug and her tow had emerged shortly prior to the collision. The attendant in charge of this Lock, had heard whistle signals from the Tug *Corporal* and had lit the green light, a signal to the *Corporal* that the Lock was ready for that tug. The *Matton* tug had been told by the Lock attendant that three tows were approaching from the west (so the Court of Appeals held, (25)); but in spite of this the *Matton* tug did not sound any whistle signals or give any other warning as she navigated from Lock 23 toward Bridge E-67 and the bend in the channel (Transcript of Record, pages 6-7). When the *Matton* was only a short distance from the Lock, but still a

good distance from the Bridge, she saw the beam of light from the *Corporal's* searchlight and knew of her approach and still the *Matton* sounded no signal and gave no warning of her approach (Transcript of Record, pages 6-7), but continued on.

Both tows were proceeding slowly making headway of only about a mile-and a half an hour. Until the *Corporal* actually saw the *Matton's* tow, the *Corporal* had no suspicion of the *Matton's* approach (27). Immediately on becoming aware of the *Matton's* presence, the *Corporal* reversed engines and the *Corporal* continued to reverse engines for two or three minutes, so that at the moment of impact the *Corporal* was making sternway as the Court of Appeals found (25). In spite of the recitation by the Court of Appeals (25) that the *Corporal* reversed engines for two to three minutes prior to collision and that the *Matton* reversed engines for only five seconds before collision, it said:

> "For aught that appears, a proper lookout on the *Corporal* could thus have caused her (the *Corporal*), by reversing sooner to avert the collision."

Nowhere is it suggested or stated by the Court of Appeals that the *Matton* required assistance or cooperation from the Tug *Corporal* in order to avoid this collision, nor is it suggested or stated that the *Matton* could not have avoided collision through her own efforts alone by the simple expedient of stopping her engines or stopping and reversing sooner than she actually did.

The Tug *Corporal* has been held equally at fault with the Tug *Matton;* not because anything which the *Corporal* did, or failed to do was proven affirmatively to have contributed to the collision, but only because the *Corporal* has not sustained a "burden of proof" which is said to have arisen during the course of the trial when it developed that

the lookout on the *Corporal* flotilla was not as attentive as he probably should have been (26, 28). On this slender reed and technicality the owners of the Tug *Corporal* are held liable for half damages in libels which demand a total of $34,000. This liability has been imposed even though the findings of both the District Court and the Court of Appeals clearly establish that the failure of the *Matton* to sound signals or to use her searchlight and thus warn the *Corporal* of her approach, lulled the *Corporal* into a false sense of security, invited her to come ahead and in effect told her that she had a clear and unobstructed path to the Lock. If the *Corporal's* lookout was inattentive it resulted from the dereliction of duty of the *Matton*. The *Corporal* was entrapped.

Reasons for Granting of Writ.

1. The manner in which the Court of Appeals herein has applied the rule of *The Pennsylvania*, 86 U. S. 125, is in conflict with the rule of *Commercial Molasses Corporation* vs. *New York Tank Barge Corporation*, 314 U. S. 104 and with the rule in other Circuits.

The Court of Appeals required the Tug *Corporal* to prove beyond a reasonable doubt that she was not guilty of fault which contributed to the collision. The Court of Appeals erroneously put on the *Corporal* the burden of proof as to the *Corporal's* fault, whereas in law the Tug *Matton* had the burden of proof as to the *Corporal's* fault.

In the *Victory-Plymothian*, 168 U. S. 410, this Court said at Page 423:

> "The burden of proof is upon each vessel to establish fault on the part of the other. * * * Any doubts regarding the management of the other vessel or the contribution of her faults, if any, to the collision, should be resolved in her favor."

The *Matton* pleaded in its answer to the libels herein (Article Ninth—Transcript of Record, Page 12):

> "The aforesaid collision and resulting damage was not due to any fault, neglect or want of care on the part of the *Edna M. Matton*, but was due to the fault, neglect and want of care on the part of the *Corporal* * * * in failing to have and maintain a proper and efficient lookout."

Certainly this allegation placed on the *Matton* the burden of proof as to the *Corporal's* fault, *W. E. Hedger Transport Co.* vs. *United Fruit Co.*, 198 F. (2d) 376. The stipulation made by the two tugs at the trial to the effect that the libellants were entitled to recover their damages from either or both tugs did not affect the fact that each tug had the burden of proof as to the fault of the other and its contribution to the collision.. The *Matton's* burden of proof remained on her throughout. The burden of proof does not shift with the evidence, *Commercial Molasses Corp.* vs. *New York Tank Barge Corp.*, 314 U. S. 104 at 110. It therefore was error for the Court of Appeals to say:

> "the *Corporal* did not sustain the burden of proof which, under the *Pennsylvania* rule, came into play once her failure to maintain a proper lookout was established."

The presumption that arises when the rule of the *Pennsylvania* comes into play is no different in effect, from the presumption of unseaworthiness which arises when a barge overturns, *Commercial Molasses Corp.* vs. *New York Tank Barge Corp.*, 314 U. S. 104. The presumption does not cause the burden of proof as to any issue to shift.

In speaking of the effect of a presumption in *Commercial Molasses Corp.* vs. *New York Tank Barge Corporation*, 314 U. S. 104, this Court said at Page 111:

> "It does not cause the burden of proof to shift, and if the bailee does go forward with evidence enough to raise doubts as to the validity of the inference, which the trier of facts is unable to resolve, the bailor does not sustain the burden of persuasion which upon the whole evidence remains upon him where it rested at the start."

and, at Page 114:

> "Upon an examination of all the evidence of which the sinking without any proven specific cause, was a part, the two courts below have found that no inference as to the cause of sinking can be drawn. Petitioner has thus failed to sustain the burden resting on it."

The Second Circuit has left no room for doubting that its use of the words "burden of proof" (28) and "burden to prove", (26) in applying the rule of *The Pennsylvania* herein, was in the literal and technical sense with their usual legal connotations. These words were not used as loose alternatives for the expressions "burden of going forward" or "burden of showing". In *The Roslyn*, 93 F. (2d) 278, 281; and in *The Cedarcliff*, 149 F. (2d) 964, the Second Circuit clearly drew this distinction in applying the presumption in charter cases. The holding by the Court of Appeals herein that the District Judge's refusal to make a requested finding was "clearly erroneous", conclusively shows that the Court of Appeals decided this case on a strict and erroneous rule of burden of proof.

The Second Circuit has evolved an interpretation of *The Pennsylvania*, 86 U. S. 125, which is in direct conflict with the interpretation of the rule in the First, Fourth and Fifth Circuits. In 1949, Chief Judge Learned Hand in the Second Circuit said in *Oriental Trading & Transport Co. v. Gulf Oil Corporation*, 173 F. (2d) 108 at Page 109:

> "In the case at bar, therefore, in order to escape half damages the *Brown* must prove *beyond reasonable doubt* that the collision would have occurred, even though she had blown at the moment when she changed her helm." (Italics added.)

Thus, in applying the rule of *The Pennsylvania* in the Second Circuit, the accused vessel must prove its innocence beyond reasonable doubt. This certainly refers to the amount of proof required. Judge Hand in a maritime collision case thus has subjected an accused vessel to the "burden of proof" rule imposed only on the prosecution in criminal cases in this Country. The language used by Judge Hand was no inadvertence, for in 1955 in *Anglo-Saxon Petroleum Co. vs. U. S.*, 222 F. (2d) 75, Judge Hand again said at Page 77:

> "We might find it hard to hold that the *White Plains* had proved beyond any reasonable doubt that her two statutory faults did not contribute to the collision."

The impact of Judge Hand's language is reflected in other decisions in the Second Circuit, such as *Dimas vs. Lehigh Valley Railroad*, 234 F. (2d) 151, wherein Judge Medina said at Page 155:

> "Plaintiffs further contend however that even if they have not proved actual fault, they have proved statutory fault, which shifted to the defendant the burden of proving that its fault was not a contributing cause of the explosion, citing *The Pennsylvania*, 86 U. S. 125. Here, again, we need not now decide whether the harsh burden of proof rule which was developed without reference to seamen's actions for negligence * * * should be extended to them."

Again, in *Diesel Tanker A. C. Dodge, Inc.* vs. *Carras*, 234 F. (2d) 374, the Second Circuit, through Judge Frank, said at Page 377:

> "Since the *Dodge* violated the statute, there is no merit in the suggestion that it is not certain that a danger signal would have enabled the *Michael* to avoid the collision. For the *Dodge* had the burden of proving that by no possibility did the violation contribute to the collision."

In *The Pennsylvania*, the Supreme Court merely had said:

> "But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

This language is a far cry from that which the Second Circuit uses, to wit: "burden of proof" and "burden of proving" and "prove beyond any reasonable doubt". The Second Circuit has converted a rule dealing with what a litigant must "show", into a rule dealing with the weight, amount and conclusiveness of a litigant's proof. *The Pennsylvania* states a rule as to a rebuttable presumption. The Second Circuit states a rule as to "burden of proof" and "extent of burden of proof".

As a natural sequel to its earlier pronouncements, the Second Circuit said herein:

"In that situation the burden was upon the *Corporal* to prove that this statutory violation could not have contributed to the collision in any way."

In contrast we find the Fifth Circuit saying in *Compania de Maderes de Carbarien* vs. *The Queenston Heights*, 220 F. (2d) 120, at Page 122:

"From the undisputed testimony, we are of the opinion that the failure to have a lookout on the bow of the *Star* did not actively contribute to the cause of the collision. The finding to the contrary by the Court below was clearly erroneous. • • • We are in accord with the statement of the First Circuit in *Seaboard Tug & Barge* vs. *Rederi A.B. Disa*, 213 F. (2d) 772, that the Supreme Court in *The Pennsylvania*, 86 U. S. 125, did not intend to establish a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision, no matter how speculative, improbable or remote."

And we find the Fourth Circuit saying in *Webb* vs. *Davis*, 236 F. (2d) 90:

"The requirements of *The Pennsylvania* rule must be strictly enforced for the safety of navigation, but it should not be pressed to such an extreme as to justify a division of damages when the accident was undoubtedly due to the negligence of an offending vessel whose actions could not be anticipated. See *Oaksmith* vs. *Garner*, 9 Cir., 205 F. (2d) 262; *National Bulk Carriers* vs. *U. S.*, 2 Cir., 183 F. (2d) 405; *General Sea Foods Corp.* vs. *J. S. Packer*, 1 Cir., 120 F. (2d) 117."

Under *Commercial Molasses Corp.* vs. *New York Tank Barge Corp.*, 314 U. S. 104, one who has the burden of proof

must sustain this burden on all the evidence, but in the instant case the *Matton* was relieved of its burden of proving by a preponderance of all the evidence that fault of the *Corporal* contributed to the collision.

The question whether the rule of *The Pennsylvania*, 86 U. S. 125, is limited by the rule of *Commercial Molasses Corp.* vs. *New York Tank Barge Corp.*, 314 U. S. 104 and whether the interpretation of *The Pennsylvania* as applied in the 1st, 4th and 5th Circuits is the proper rule, is of widespread importance in the field of Admiralty. Almost invariably in cases involving collisions between vessels and very often in other Admiralty suits, *The Pennsylvania*, 86 U. S. 125, is rested on in the Second and other Circuits, as conclusive of the fault of one side or the other. We even find Shepherds Citations falling into the error of the Second Circuit and under *The Pennsylvania*, 86 U. S. 125 there are tabulated column after column of cases which allegedly cite *The Pennsylvania* as authority, for "Statutory violation—Burden of proof." This even is true of the Shepherd volumes published after *Commercial Molasses Corp.* vs. *New York Tank Barge Corporation*, 314 U. S. 104 was decided.

2. The holding of the Court of Appeals herein:

> "In the case at bar the appellant specifically requested a finding of statutory violation and joint liability against the *Corporal* because of its ineffective lookout. The court's refusal so to find, in the light of his conclusions, must be taken as a determination that the statutory violation could not have played any part in the ultimate collision. We think, however, that on the record in this case such a finding would have been clearly erroneous."

is in conflict with the rule laid down by this Court in *McAllister* vs. *United States*, 348 U. S. 19, 20.

> "A finding is clearly erroneous when, although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The Court of Appeals herein did not "On the entire evidence" express "the definite and firm conviction that a mistake had been committed." It said instead,

> "For aught that appears, a proper lookout on the *Corporal* could thus have caused her by reversing sooner, to avert collision." (27)

This language immediately is supplemented by the statement which follows:

> "We can only conclude that the *Corporal* did not sustain the burden of proof * **." (28)

Thus the Court of Appeals did not find that it had been proved by a preponderance of the evidence that the *Corporal's* fault actually contributed to the collision.

To reach its conclusion that the District Court was clearly erroneous, the Court of Appeals felt it necessary to take another step—it held that the refusal of the District Court to make a requested finding that the *Corporal's* inattentive lookout contributed to the collision "must be taken as a determination that the statutory violation could not have played any part in the collision." (26) The District Court acting in conformity with the rule that "The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence * * *." *Commercial Molasses Corp.* vs. *New York Tank Barge Corp.*, 314 U. S. 104, 110, no doubt felt that the requested finding was not supported by a preponderance of the proof.

The District Court saw and heard the witnesses and was in a better position than the Court of Appeals to pass on the requested finding.

In no other branch of the law is the refusal of a Court to find the positive of a proposition taken to be the equivalent of an express finding of the negative. Had it not been for the Second Circuit's imposition on the *Corporal* of the "burden of proof beyond reasonable doubt" that her fault did not contribute to the collision, we do not think that the Court of Appeals would have disturbed the District Court's findings herein.

In any event it is to be noted that the Court of Appeals did not rule to be clearly erroneous a finding which the District Court actually made, but it ruled to be clearly erroneous a finding which the District Court never made—"such a finding would have been clearly erroneous." (26)

3. The decision of the Court of Appeals herein imposed the duty on a privileged vessel to avoid collision by her own efforts alone and with no cooperation from the burdened vessel and in this regard, is in conflict with decisions of this Court. The Court quotes its own language (27) in *The Salutation*, 79 F. (2d) 609, 611, that a privileged vessel is not justified in keeping on "beyond that point when the burdened vessel *by her own efforts* could no longer avoid collision." (Italics ours.) That is the rule repeatedly stated by this Court.

The Brittania, 153 U. S. 130;
The Delaware, 161 U. S. 459;
Postal S. S. vs. *El Isleo*, 308 U. S. 378.

However, the Court of Appeals held in conflict with the rule. It seems anamolous to hold liable the privileged *Corporal* under this rule, when she reversed engines for two to three minutes before collision and had sternway at impact and when the burdened *Matton* clearly did nothing to avoid collision until five seconds before collision according to the findings of the Court of Appeals (25).

This question is important because the decision of the Court of Appeals places a new burden on a privileged vessel not heretofore recognized. To require a privileged vessel to avoid collision unassisted will create chaos and disorder in navigation. The privileged vessel no longer will continue on as she now is required to do, until the burdened vessel "by her own efforts alone" cannot avoid collision. *National Bulk Carriers* vs. *United States*, 183 F. (2d) 405 (C. C. A. 2).

4. The expressed reluctance of the Court of Appeals to hold the *Corporal* at fault herein, and its finding that the faults were disproportionate, clearly indicate that the *Corporal* should have been exonerated herein under the Major-Minor Fault Rule. *The Victory-Plymothian*, 168 U. S. 410, at 423:

> "As between the vessels, the fault of the *Victory* being obvious and inexcusable, the evidence to establish fault on the part of the *Plymothian* must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.
>
> The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409 (41: 1053, 1057): 'Indeed, so gross was the fault of the *Umbria* in this connection that we should unhesitatingly apply the rule laid down in the *City of New York* (Alexandre *v.* Machan), 147 U. S. 72, 85 (37: 84, 90), and *The Ludwig Holberg*, 157 U. S. 60, 71 (39: 620, 624), that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor.'"

The City of New York, 147 U. S. 72;
The Umbria, 166 U. S. 404.

The refusal of the Second Circuit to apply this rule is a departure from its prior ruling (1954) in *Tanker Hygrade* vs. *Dynamic*, 213 F. (2d) 453 which just as here, involved damage to the *Hygrade* 24 when she met the Tug *Dynamic* approaching from the opposite direction at a bend in the New York State Barge Canal. In that case the Tug *Choctaw*, which was pushing the *Hygrade* No. 24, was exonerated even though her "lookout" 200 or more feet from the barge's bow could not see any better than the tug's Pilot. See also *Oriental Trading & Transport Co.* vs. *Gulf Oil*, 173 F. (2d) 108, 111, Cert. den. 337 U. S. 919.

The Second Circuit on other occasions has not hesitated to "close our eyes to doubtful delinquencies."

> *Oriental Trading & Transport Co.*, 173 F. (2d) 108 at 111;
> *Russell Poling* vs. *Conners-Standard Marine and Tug Corporal*, 252 F. (2d) 167;
> *The Cornelius Vanderbilt*, 120 F. (2d) 766;
> *The Cherokee*, 45 F. (2d) 150 at 152;
> *Kosnac* vs. *The Norcuba*, 243 F. (2d) 890.

This question is important because the Court of Appeals, by its express findings and accompanying ruling, in effect now is discarding and repudiating the long-established Major-Minor Fault Rule, which obviously was based on fairness and justice.

5. The question whether there is to be adopted the rule of comparative negligence and apportionment of liability for damages between vessels involved in collision, in the same ratio as their faults were productive of the collision, is of the most extreme importance to the Admiralty Bar and the Maritime Industry of this Country and it also is of importance even to foreign shipping interests and insur-

ers. The Court of Appeals points out herein that this Court said in *Halcyon Lines* vs. *Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, 284, that it is "established Admiralty doctrine" that mutual wrongdoers in collision cases shall share the damages equally. Yet the Court of Appeals again has expressed the view herein that if permitted to do so, it would apportion liability for damage in collision cases.

At least since 1949 the Second Circuit has expressed its objection to the half-damage rule repeatedly and with increasing force and frequency.

> "* * * the irrationality of the present situation in the Admiralty is glaringly illustrated when we consider that, if personal injuries are involved proportional fault is recognized. However we have no power to divest ourselves of this vestigial relic, we can only close our eyes to doubtful delinquencies."
>
> *Oriental Trading & Transport Co.* vs. *Gulf Oil Corp.* (C. C. A. 2-1949), 173 F. (2d) 108 at 111, Cert. den. 337 U. S. 919.

> "The Admiralty rule of evenly divided damages in cases of injury to property * * * has frequently received criticism as unfair. On that ground virtually every country except ours has abandoned it. Nevertheless, we feel obliged to apply that rule until the Supreme Court or Congress instructs us otherwise."
>
> *Ahlgren* vs. *Red Star Towing* (C. C. A. 2-1954), 214 F. (2d) 618 at 620.

> "We think the *Dodge's* fault was not so minor in character as to justify the application of the Minor fault doctrine. The resultant division of damages, half and half, is irrational and unjust. Guided by *The Max Morris*, 137 U. S. 1 we have held the more rational doctrine of comparative negligence applies in the case of personal injuries. We can not do likewise in a case like this."

Diesel Tanker A. C. Dodge vs. *Carras* (C. C. A. 2-1956), 234 F. (2d) 374 at 377, Cert. Den. 352 U. S. 928, 929.

In *Adams* vs. *Constructive Aggregates*, 237 F. (2d) 884, Cert. den. 352 U. S. 971, the Second Circuit said in 1956 at Page 887:

> "We agree with Melrose's counsel that the fault of Sanderaft was far more flagrant than that of Melrose. But even so, we hold that Melrose's fault was too clear and substantial to bring her within the 'major-minor fault rule.'
>
> Affirmed on both appeals."

And, on rehearing (p. 887), it said:

> "The contention now made that the damages should be proportioned in accordance with the comparative faults of the colliding vessels, is overruled. In so ruling we do not disagree with the finding below that a division of the damages, 80% against Sanderaft and 20% against Melrose, would accord with the facts and the equities. However, the trial judge was plainly right in holding that prior decisions of this court required that the damages be equally divided. *Ahlgren* v. *Red Star Towing & Transportation Co.*, 2 Cir., 214 F. (2d) 618, 621. We have frequently called attention to the inherent injustice of this rule. *Ahlgren* v. *Red Star Towing & Transportation Co., supra; The City of Chattanooga*, 2 Cir., 79 F. (2d) 23. See also dissenting opinion of Judge L. Hand in *Ulster Oil Transport Corp.* v. *The Matton*, 2 Cir., 210 F. (2d) 106, 110. But the rule of equal division of property damage is so well established in this country that it would create intolerable confusion were a court of intermediate jurisdiction such as ours to deviate from it. We shall therefore continue to apply the rule until there shall be authoritative sanction for departure therefrom.
>
> Petition denied."

The Third Circuit too, is now voicing objection to the half damage rule. *Tank Barge Hygrade* v. *The Gatco New Jersey*, Dec. 1957—250 F. (2) 485.

Rejection and abrogation of the Major-Minor Fault Rule of *The Victory-Plymothian*, 168 U. S. 410 seems to be running hand in hand with criticism of the half damage rule. In the instant case we have that with more. We have here an application of the rule of *The Pennsylvania*, 86 U. S. 125 in an unwarranted way and a conflict with the rule of *McAllister* vs. *United States*, 348 U. S. 19.

If we are to lose the benefit of the Major-Minor Fault Rule as the *Corporal* did herein, solely on the basis of technical rules of burden of proof and the impact of a trial judge's refusal to make a requested finding, then it becomes a matter of extreme importance to the Maritime Industry generally that Certiorari be granted herein on the question whether the rule of half damages should still obtain in Admiralty property damage cases.

As this Court indicated in *Halcyon Lines* vs. *Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, 285, this Court has power to fashion rules in Maritime affairs where wholly convinced that it would best serve the ends of justice.

Conclusion.

A Writ of Certiorari should be granted in accordance with the prayer of this Petition.

Dated: New York, N. Y.
August 12th, 1958.

Respectfully submitted.

Edmund F. Lamb,
Proctor for Petitioner.
80 Broad Street,
New York 4, N. Y.

Vincent A. Catoggio,
Advocate.

APPENDIX.

Opinion of Hincks, C. J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 310-311—October Term, 1957.

(Argued April 30, 1958 Decided May 29, 1958.)

Docket Nos. 24972-3

DWYER OIL TRANSPORT CO., INC., as owner of Tank Barge *Dwyer No. 104*,
Libelant-Appellant,

v.

Tug *Edna M. Matton*, MATTON STEAMBOAT CO., INC.,
Claimant-Appellant,

and

Tug *Corporal*, TUG CORPORAL CORPORATION,
Claimant-Appellee.

B. No. 80 CORPORATION, as owner of the Barge *B. No. 80*,
Libelant-Appellant,

v.

Tug *Edna M. Matton*, MATTON STEAMBOAT CO., INC.,
Claimant-Appellant,

and

Tug *Corporal*, TUG CORPORAL CORPORATION,
Claimant-Appellee.

Before:

CLARK, *Chief Judge*,
HINCKS and STEWART, *Circuit Judges*.

Opinion of Hincks, C. J.

Appeals from interlocutory decrees entered in the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, holding claimant-appellant solely liable for the damage caused. Decrees modified to hold claimant-appellee jointly liable.

THOMAS F. DALY, New York, N. Y. (Macklin, Speer, Hanan & McKernan, New York, N. Y., on the brief), *for Dieger Oil Transport Co., Inc.*

FRANK C. MASON, New York, N. Y. (Mahar & Mason and James J. Mason, New York, N. Y., on the brief), *for Matton Steamboat Co., Inc.*

VINCENT A. CATOGGIO, New York, N. Y. (Purdy, Lamb & Catoggio, New York, N. Y., on the brief), *for Tug Corporal, Tug Corporal Corporation.*

HENRY C. EIDENBACH, New York, N. Y. (Hagen & Eidenbach, New York, N. Y., on the brief), *for B. No. 80 Corporation.*

HINCKS, *Circuit Judge:*

This is an appeal in a collision case from interlocutory decrees holding Matton Steamboat Co., Inc. solely responsible for an accident through its tug *Edna M. Matton*, exonerating the Tug Corporal Corporation from any liability, and fixing liability on Matton for damage to two barges, viz., the *Dieger* No. 104, which was being pushed by the tug *Matton*, and the *B. No. 80*, which was being pushed by the tug *Corporal*. Matton's sole contention is that the district court should have found the *Corporal* jointly liable for the damage.

The collision occurred in the New York State Barge Canal near midnight on August 6, 1955. The *Matton* was proceeding in a westerly direction and was approaching a bridge over a bend in the canal. The trial judge found, and it is not disputed, that it would have been imprudent for both vessels to have attempted to make a passing in the narrow bending channel beneath the bridge. He further found that the *Corporal*, moving in an easterly direction, properly blew a bend signal and had its searchlights in position to enable her to navigate under the bridge. On the other hand, it was found that the *Matton* did not blow a bend signal, had no lookout and, until the collision was imminent, was running with its searchlights off even though it had just come through a canal lock where it had been warned that three eastbound flotillas were in the vicinity. Just before the collision (two to three minutes before, according to Corporal's engineer) the *Corporal* reversed engines and began making sternway. The *Matton* did not reverse until five seconds before the collision, according to the testimony of its Master. The collision occurred between the respective bows of the two barges. The point of impact was a short distance east of the bridge—before the *Matton* reached the bridge.

Matton relies upon two grounds in its attempt to have the *Corporal* declared jointly liable for the collision. The first ground is that the *Corporal* violated the "Narrow Channel" Rule, which states: "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." Article 25, Inland Rules, 33 U. S. C. § 210. As to this, it is true that immediately prior to the collision the port bow of the *B. No. 80*, which was being pushed eastward by the *Corporal*, was 30 or 40 feet northerly of mid-channel. However, the judge found that this was not imprudent navigation of this particular bend. Each barge was over 40 feet wide and 200 feet long. The waterway between the bridge abutments was something over

90 feet wide. In view of the length and width of the flotillas, the nature of the bend, and the width of the channel between the abutments, it is impossible to say that that finding was clearly erroneous.

Appellant's second ground is based upon a violation of Article 29 of the Inland Rules, 33 U. S. C. § 221, which states in relevant part: "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect * * * to keep a proper lookout * * *."

Although the district judge made no specific finding, the testimony of the *Corporal's* watchman on cross examination clearly indicates that rather than standing in the front of the *B. No. 80* and looking up the channel, he was sitting against a tank 40 feet from the bow of the barge and was watching the bank. This impresses us as being a clear violation of the above rule. In that situation the burden was upon the *Corporal* to prove that this statutory violation could not have contributed to the collision in any way. *The Pennsylvania*, 86 U. S. 125; *Poling Russell, Inc.* v. *United States*, 2 Cir., 196 F. 2d 959; *Ira S. Bushey & Sons* v. *United States*, 2 Cir., 172 F. 2d 447. These cases place a severe burden upon the statutory violator. But that burden is not unbearable. *National Bulk Carriers* v. *United States*, 2 Cir., 183 F. 2d 405, cert. den. 340 U. S. 865; *The William J. Riddle*, 102 F. Supp. 884, affirmed 2 Cir., 200 F. 2d 608.

In the case at bar the appellant specifically requested a finding of statutory violation and joint liability against the *Corporal* because of its ineffective lookout. The court's refusal so to find, in the light of his conclusions, must be taken as a determination that the statutory violation could not have played any part in the ultimate collision. We think, however, that on the record in this case such a finding would have been clearly erroneous. For the testimony of the *Corporal's* lookout and its pilot indicates that the *Matton* was spotted by both almost simultaneously when the bows of the two barges were only between 50 and 100 feet apart.

Although the *Matton* did not have its searchlights on, it is undisputed that its running lights were in operation. In this state of facts, we think it clear that if the lookout had been alert at his proper station 220 feet forward of the *Corporal's* pilot as the *B. No. 80* rounded the bend in the river, the lookout should have seen the *Matton* a considerable time before it could have been observed by the *Corporal's* pilot.

We find nothing in the evidence which would have warranted a finding that, if seasonably informed of *Matton's* approach when the distance between the two barges was significantly greater than the 50 to 100 feet interval which separated them when the *Matton* was actually observed, the *Corporal* could not have averted the collision by reversing sooner. For present purposes we may assume that the *Corporal* was the privileged vessel since, if both flotillas continued at the same speed, the *Corporal's* barge would reach the bridge first. And we may further assume that when the pilot of a privileged vessel is informed of the approach of a burdened vessel the privileged vessel may be entitled to hold its course in the expectation that the burdened vessel will fulfill its navigational obligations. Nevertheless, "though privileged, he [the pilot of the privileged vessel] was not justified in keeping on beyond that point when the burdened vessel by her own efforts could no longer avoid collision." *The Salutation*, 2 Cir., 79 F. 2d 609, 611. See also *Ulster Oil Transport Corp.* v. *The Matton No. 20*, 2 Cir., 210 F. 2d 106, recognizing an obligation on the privileged vessel to reverse engines when the danger of collision is imminent. Thus if the *Matton* had been seen when the distance between the flotillas was greater—perhaps as much as 220 feet greater—and if in that situation the *Corporal* might properly have continued on for a time in the expectation that it would be allowed to pass the bridge first, as the flotillas approached each other there necessarily would have come a time when it became the duty of the *Corporal* to reverse. For aught that appears, a proper lookout on the

Corporal could thus have caused her, by reversing sooner, to avert the collision.

We can only conclude that the *Corporal* did not sustain the burden of proof which, under the *Pennsylvania* rule, came into play once her failure to maintain a proper lookout was established.

Our conclusion is indeed reluctantly made. The admiralty rule of equally dividing damages in property damage cases has been consistently criticized, e.g., *Ahlgren* v. *Red Star Towing & Trans. Co.*, 2 Cir., 214 F. 2d 618; *Oriental Trading & Transport Co.* v. *Gulf Oil Corp.*, 2 Cir., 173 F. 2d 108, 111, cert. den. 337 U. S. 919; Gilmore and Black, The Law of Admiralty, 438 *et seq.* However, the Supreme Court has recently referred to the rule as "established admiralty doctrine," *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 284, and we are obliged to apply the rule in this case despite the disproportionate degrees of fault disclosed.

The decree is modified to hold the *Corporal* jointly at fault with the *Matton*.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DWYER OIL TRANSPORT CO., INC., as owner of Tank Barge *Dwyer No. 104*,
Libelant-Appellant,

v.

Tug *Edna M. Matton*, MATTON STEAMBOAT CO., INC.,
Claimant-Appellant,

and

Tug *Corporal*, TUG CORPORAL CORPORATION,
Claimant-Appellee.

B. NO. 80 CORPORATION, as owner of the Barge *B. No. 80*,
Libelant-Appellant,

v.

Tug *Edna M. Matton*, MATTON STEAMBOAT CO., INC.,
Claimant-Appellant,

and

Tug *Corporal*, TUG CORPORAL CORPORATION,
Claimant-Appellee.

Before CLARK, Chief Judge, and HINCKS and STEWART, Circuit Judges.

On Petition for Rehearing.

VINCENT A. CATOGGIO, of Purdy, Lamb & Catoggio, New York City, for Tug *Corporal*, Tug Corporal Corporation, appellee.

Per Curiam.

Petition for rehearing denied.

C. E. C.
C. C. H.
P. S.
U. S. C. JJ.

June 16, 1958

Judgment in re *Dwyer Oil Transportation, Inc.* v. *Tug Edna M. Matton.*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of May one thousand nine hundred and fifty-eight.

Present:

Hon. CHARLES E. CLARK,
Chief Judge.

Hon. CARROLL C. HINCKS,
Hon. POTTER STEWART,
Circuit Judges.

DWYER OIL TRANSPORT COMPANY, INC., as owner of the tank Barge *Dwyer No. 101*,
Libellant-Appellant,

v.

Tug *Edna M. Matton*, MATTON STEAMBOAT COMPANY, INC.,
Claimant-Appellant,

Tug *Corporal*, TUG CORPORAL CORPORATION,
Claimant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified to hold the *Corporal* jointly at

fault with the *Matton* in accordance with the opinion of this court; with costs to the appellants.

A. DANIEL FUSARO,
Clerk.

Judgment *in re No. 80 Corporation* v. *Tug Edna M. Matton.*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of May one thousand nine hundred and fifty-eight.

Present:

Hon. CHARLES E. CLARK,
Chief Judge.

Hon. CARROLL C. HINCKS,
Hon. POTTER STEWART,
Circuit Judges.

B. No. 80 CORPORATION, as owner of the Barge *B. No. 80*,
Libelant-Appellant,
v.
Tug *Edna M. Matton*, MATTON STEAMBOAT COMPANY, INC.,
Claimant-Appellant,
Tug *Corporal*, TUG-CORPORAL CORPORATION,
Claimant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Judgment in re B. No. 80 Corporation v. Tug Edna M. Matton.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified to hold the *Corporal* jointly at fault with the *Matton* in accordance with the opinion of this court; with costs to the appellants.

A. Daniel Fusaro,
Clerk.